



LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2017-17]

Fees for Electronic Recordation and Notices of Intention to Obtain a Compulsory License

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The U.S. Copyright Office is publishing a final rule establishing a separate, lower filing fee for recording documents when they are submitted with an electronic title list. Separately, the Office is noting a policy change, effective on the same date as the final rule, to require the payment of fees for the filing of *all* notices of intention to obtain a compulsory license to make and distribute phonorecords, including those that are filed in the Office after failed delivery to the copyright owner.

DATES: Effective December 18, 2017.

FOR FURTHER INFORMATION CONTACT: Sarang V. Damle, General Counsel and Associate Register of Copyrights, by email at sdam@loc.gov, or Jason E. Sloan, Attorney-Advisor, by email at jslo@loc.gov. Each can be contacted by telephone by calling (202) 707-8350.

SUPPLEMENTARY INFORMATION:

I. New Recordation Fee for Electronic Title Lists

A. Background

This final rule adjusts U.S. Copyright Office fees in accordance with 17 U.S.C. 708. Section 708(a) specifies that “[f]ees shall be paid to the Register of Copyrights” for services, including a set of specified services enumerated in paragraphs (1) through (11) of that subsection.¹ This includes, as relevant here, fees for “the recordation, as provided by section 205, of a transfer of copyright ownership or other document.”² Fees for this service and the other services specifically enumerated in section 708(a)(1)–(9) are to be set forth in a proposed schedule that is sent to Congress 120 days before the adjusted fees can take effect.³ The fee may go into effect after the end of that period unless “a law is enacted stating in substance that the Congress does not approve the schedule.”⁴

Before proposing new fees for the services enumerated in (1) through (9), the Register must conduct a study of the Office’s costs and must consider the timing of any fee adjustments and the Office’s authority to use the fees consistent with the Office’s budget.⁵ Section 708(b) further provides that the Register may adjust these fees to “not more than that necessary to cover the reasonable costs incurred by the Copyright Office for . . . [such services], plus a reasonable inflation adjustment to account for any estimated increase in costs.”⁶ Finally, section 708(b) also mandates that the “[f]ees [so]

¹ 17 U.S.C. 708(a).

² *Id.* at 708(a)(4).

³ *Id.* at 708(b)(5).

⁴ *Id.* Section 708(a) also authorizes the Register to fix fees for other services not enumerated in section 708(a)(1)–(9), such as the cost of preparing copies of Office records. *Id.* at 708(a). The fees for these additional Office services, as well as fees for the filing of cable and satellite statements of account under paragraphs (10) and (11) of section 708(a), need not be submitted to Congress, but are instead established by the Register of Copyrights by regulation based on the Office’s costs. *Id.*

⁵ *Id.* at 708(b)(1).

⁶ *Id.* at 708(b)(2).

established . . . shall be fair and equitable and give due consideration to the objectives of the copyright system.”⁷

B. Cost Study

Pursuant to section 708, the Office submitted a proposed fee schedule and analysis to Congress on August 18, 2017.⁸ That study and this final rule implementing the fee it proposed concern a single Copyright Office service: the recording of documents accompanied by electronic title lists, *i.e.*, lists of certain indexing information about the works to which such documents pertain.⁹

Since 1870, the Copyright Office has recorded documents pertaining to works under copyright, such as assignments, licenses, and grants of security interests. Under the Copyright Act, recordation of such documents is voluntary, but provides certain legal entitlements, such as constructive notice of the facts stated in the recorded document when certain conditions are met.¹⁰ Thus, the Office has an important interest in ensuring that the public record of copyright transactions is as timely, complete, and accurate as possible.

In general, the recordation process is still paper based, and Office staff manually transcribe information from documents into an electronic format to permit indexing in the

⁷ *Id.* at 708(b)(4).

⁸ The study is available on the Office’s website at <https://www.copyright.gov/policy/feestudy2017/fee-study-2017.pdf>.

⁹ Examples of such indexing information can include the types of works, the titles of the works (including alternate titles), their respective registration numbers, and authorship information.

¹⁰ 17 U.S.C. 205(c) (“Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and (2) registration has been made for the work.”).

Office's public catalog. Among the information that must be indexed are the titles of and related information for copyrighted works associated with the document submitted for recordation, which are typically presented in a list appended to the document, referred to informally as a "title appendix." A title appendix associated with a document can include hundreds, or even thousands, of titles.

The manual entry of information from title appendices is a significant contributor to long processing times in the Office's Recordation Section. In 2014, to gain efficiencies, the Office promulgated a new rule permitting documents submitted for recordation to be accompanied by an electronic title list in the form of an Excel spreadsheet.¹¹ Document recordation fees, however, were last adjusted before the introduction of electronic title lists. Thus, the Office has never set a separate fee for recording documents with such lists, and currently charges the same recordation fee regardless of whether the document has an electronic title list.

As a result, the Office's cost study proposed implementing a separate, reduced filing fee for groups of additional titles provided in an electronic title list that accompanies a document submitted for recordation. The fee adjustment implemented by this final rule only pertains to that fee. The Office is not adjusting the baseline document recordation fee of \$105 at this time; that fee will remain the same for recordations made both with and without electronic title lists. Nor is the Office adjusting the fee for groups of additional titles when an electronic title list is not used. Proposals for those fees will be included in a comprehensive study of all Copyright Office costs and fees expected to be submitted to Congress next year.

¹¹ See 79 FR 55633 (Sept. 17, 2014) (codified at 37 CFR 201.4(c)(4)).

The fee-setting methodology employed by the study used activity-based costing principles which comply with standards set for federal managerial accounting¹² and with guidance for fee setting as published by the Office of Management and Budget Circular A-25 Revised: User Charges,¹³ and the Government Accountability Office.¹⁴ Under the approach, total costs for the entire recordation function were used to develop a time-based multiplier, which was then used to calculate the cost of the individual activities for recording the information contained in electronic title lists. The total cost of completing an electronic title list transaction was determined by aggregating the cost of each individual activity.

Cost studies of this type are typically retrospective, using actual data from a fiscal year that has concluded. This study used actual data from fiscal year 2016, but the methodology was applied prospectively against a planned new service. This prospective approach was used because, concurrent with the effective date of this rule, the Office is implementing a new, more efficient process for providing this service than the one currently employed. This methodology was reviewed and validated by an independent consulting firm.

The new fee for documents submitted with electronic title lists to be implemented by this final rule is as follows:

¹² This includes the Federal Accounting Standards Advisory Board's *Managerial Cost Accounting Concepts and Standards for the Federal Government*, which promotes activity-based costing for calculating the cost of providing services. See FED. ACCOUNTING STANDARDS ADVISORY BD., STATEMENT OF FEDERAL FINANCIAL ACCOUNTING STANDARDS NO. 4: MANAGERIAL COST ACCOUNTING CONCEPTS AND STANDARDS FOR THE FEDERAL GOVERNMENT (1995).

¹³ See Office of Mgmt. and Budget, *Circular No. A-25 Revised: User Charges*, WHITEHOUSE.GOV, http://www.whitehouse.gov/omb/circulars_a025 (last visited Aug. 13, 2017).

¹⁴ See U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL USER FEES: A DESIGN GUIDE (GAO-08-386SP) (2008).

1 to 50 additional titles: \$60

51 to 500 additional titles: \$225

501 to 1,000 additional titles: \$390

1,001 to 10,000 additional titles: \$555

10,001 or more additional titles: \$5,550

In the analysis submitted to Congress, the Office determined that while use of electronic title lists can significantly increase the Office's processing efficiency, remitters had little incentive to use them. Thus, the Office proposed, and is now instituting, a fee for using electronic title lists that is generally lower than the current fee for recordings made without them. The lower fee is being adopted primarily to incentivize use of electronic title lists for documents with more than ten additional titles¹⁵ in an effort to increase administrative efficiency and to offer a less expensive avenue to obtaining the benefits of recording a document with the Copyright Office.

In considering the fairness, equity, and objectives of the copyright system, the Office believes that offering recordation services for a lower fee, where remitters have done the work to create an electronic title list, should result in a wider range of remitters submitting documents and may also result in existing remitters submitting additional or updated documents with more frequency than they might otherwise. Receipt of additional recorded documents should result in greater copyright ownership data being incorporated into the Office's records, which furthers the Office's mission and benefits the public at large.

¹⁵ Though documents with ten or fewer additional titles may be submitted with an electronic title list, the final rule will deliver fee savings to remitters where documents have more than ten additional titles.

In its analysis, the Office also determined that as compared to manually indexing documents, where more titles generally means more processing time and higher costs, when an electronic title list is used, processing time is typically more constant. However, in further evaluating the fairness, equity, and objectives of the copyright system, the Office has decided to adopt a tiered pricing structure based on the number of titles to which the document pertains. Under this scheme, larger filers submitting documents with a larger number of titles pay a higher fee for the added benefit they receive (when the fee is viewed on a per-title basis) to offset the lower total fee for smaller filers with fewer titles. The first four tiers of the proposed schedule increase incrementally based on the total number of additional titles submitted. The reason for the larger jump between the fourth and fifth tiers is because of the significant added costs to the Office to process documents with 10,000 or more titles, caused by current system limitations.

The Office notes that the proposed fee schedule will be revisited as part of a comprehensive study of all Office costs and fees to be completed next year. As discussed above, the goal of the proposed fee schedule is primarily to incentivize use of electronic title lists. To do that, the proposed fee offers a discount from the ordinary recordation fee of \$35 per group of ten additional titles. When the full fee study examines all Office costs and evaluates an appropriate fee to record a document without an electronic title list in light of current costs, it is possible that fee will increase, in which case it is also possible that the fee being adopted for using an electronic title list may be adjusted upward as well to ensure adequate cost recovery.

C. Effective Date

Congress’s 120-day review period under 17 U.S.C. 708(b)(5) began after the Office submitted the proposed fee schedule and analysis on August 18, 2017. If no law is enacted stating in substance that Congress does not approve of the proposed recodation fee during such time, the fee will be instituted pursuant to this final rule, effective December 18, 2017.

II. Notices of Intention

Though not related to the above-discussed cost study or final rule, the Office is taking this opportunity to provide public notice that it will implement a policy change regarding fees for notices of intention to obtain a compulsory license to make and distribute phonorecords (“NOIs”).

Under the Copyright Act, section 115 establishes a compulsory license, whereby anyone may make and distribute phonorecords of nondramatic musical works, subject to certain terms and conditions, and upon paying royalties when applicable. To obtain a compulsory license, a licensee must serve an NOI on the relevant copyright owner in the form and manner specified by Copyright Office regulations.¹⁶

In two circumstances, however, an NOI can be filed with the Copyright Office rather than the copyright owner. First, if the public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, the NOI can instead be filed with the Office.¹⁷ These “unidentified NOIs” can be filed electronically or in paper hard copy, though a discounted fee is offered for electronic submissions.¹⁸

¹⁶ *See generally* 37 CFR 201.18.

¹⁷ 17 U.S.C. 115(b)(1).

¹⁸ 37 CFR 201.3(e)(1).

Second, if the NOI is sent to the last address for the copyright owner shown by the Office's records, but is returned to the sender because the copyright owner was no longer located at that address or refused to accept delivery, the Office's regulations permit the "original Notice as sent" to be filed with the Office, along with a "brief statement that the Notice was sent to the last address for the copyright owner shown by the records of the Copyright Office but was returned," and may also "be accompanied by appropriate evidence that it was mailed to, or that delivery by reputable courier service was attempted at, that address."¹⁹ Typically, for these "returned-to-sender NOIs," the Office receives the NOI in the original mailing envelope marked with a return to sender label. The Office does not currently have any mechanism for accepting these NOIs electronically.²⁰

The Office's regulations used to explicitly state that no filing fee would be charged for returned-to-sender NOIs, while such a fee *would* be charged for the unidentified NOIs.²¹ But in 2001, the Office issued a notice of proposed rulemaking seeking to remove this limitation, as "[t]he cost to the Office of processing the filing of a Notice of Intention is the same whether the copyright owner is not identified in the records of the Office or the copyright owner is no longer located at the address shown in the records of the Office or has refused to accept delivery."²² The Office believed that the

¹⁹ *Id.* § 201.18(f)(2).

²⁰ *See id.*

²¹ Compare 37 CFR 201.18(e)(1) (2003) ("Notices of Intention submitted for filing shall be accompanied by the fee specified in § 201.3(e).") with *id.* § 201.18(e)(3) ("No filing fee will be required in the case of Notices filed under this paragraph.").

²² 66 FR 45241, 45243 (Aug. 28, 2001); *see also* 69 FR 11566, 11572 (Mar. 11, 2004) (additional, related notice of proposed rulemaking reiterating that "the Office intends to amend its rules to require a filing fee in each instance where the Notice is filed with the Copyright Office without regard to the licensee's reason for filing the Notice with the Office").

same filing fee “should be charged in both cases.”²³ The final rule, effective in 2004, adopted that proposal, repealing the regulatory language that had expressly prohibited charging a fee.²⁴ Consistent with this rulemaking, the Copyright Office’s fee schedule does not distinguish between different types of NOIs.²⁵

In practice, however, and in part due to the extremely low volume of returned-to-sender NOIs the Office received in the years following adoption of the 2004 rule, the Office abstained from imposing the established fee. In recent years, however, the volume of returned-to-sender NOIs has increased sharply. Last year the Office received over 800 such NOIs, and this year the Office has received over 2,000 to date. Each of these NOIs must be individually and manually processed. Because of this increased burden, the Office can no longer afford to forbear from the collection of fees. Accordingly, this document announces a policy change that will be implemented on December 18, 2017: any returned-to-sender NOIs received in the Office on or after that date *must* be accompanied by the same filing fee applicable to other paper-filed NOIs, which is currently \$75 plus \$20 per group of one to ten additional titles.²⁶ The Office is publicly announcing this policy change in advance to give remitters of returned-to-sender NOIs time to adjust their practices.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Final Regulations

²³ 66 FR at 45243; *see also* 69 FR at 11572.

²⁴ 69 FR 34578, 34583 (June 22, 2004).

²⁵ *See* 37 CFR 201.3(e)(1) (establishing a fee for “[r]ecordation of a notice of intention to make and distribute phonorecords” without differentiation).

²⁶ *See id.*

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Amend § 201.3 by revising paragraph (c)(16) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

* * * * *

(c) * * *

	Fees
Registration, recordation and related services	(\$)
* * * * *	
(16) Recordation of a document, including a notice of intention to enforce	
Single title	105
Additional titles (per group of 1 to 10 titles)	35
Additional titles provided in an electronic title list	
1 to 50 additional titles	60
51 to 500 additional titles	225
501 to 1,000 additional titles	390
1,001 to 10,000 additional titles	555
10,001 or more additional titles	5,550
Correction of online Public Catalog data due to erroneous	7

electronic title submission (per title)

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Dated: October 24, 2017.

Karyn Temple Claggett,
Acting Register of Copyrights and
Director of the U.S. Copyright Office.

Approved by:

Carla D. Hayden,
Librarian of Congress.

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